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INTRODUCTION

GARCIA AND THE VALUES OF FEDERALISM: ON THE NEED FOR A RECURRENCE TO FUNDAMENTAL PRINCIPLES*

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Two centuries ago, the Framers who met at Philadelphia labored to produce a constitution crafted to the needs of a free people living in a republic of extended territory. Drawing on the lessons of history, they sought to give the central government sufficient authority to deal with such national concerns as commerce among the states, while dispersing power in such a way as to protect individual liberty and local self-government—two of the ends for which the war of independence had been waged.

* © 1985 A.E. Dick Howard. George Mason's Declaration of Rights for Virginia (1776) declares: "That no free government, nor the blessings of liberty, can be preserved to any people, but by . . . frequent recurrence to fundamental principles . . ."

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A linchpin of that constitutional order is federalism. One has but to read the text of the Constitution—which refers to the states at least fifty times—to realize how central the concept of federalism was to the Founders' thinking. Indeed, it was a concern about the potential power of the new federal government that led to the adoption of the Bill of Rights.

In the nineteenth century, that perceptive French traveler, De Tocqueville, lavished praise on American federalism in his *Democracy in America*. On the link between self-government and liberty, he commented, "A nation may establish a free government, but without municipal institutions it cannot have the spirit of liberty."¹

As Americans prepare to celebrate the Constitution's bicentennial, the Supreme Court appears to have forgotten both the Framers' intent and the teachings of the nation's history. In February the Court decided *Garcia v. San Antonio Metropolitan Transit Authority*.² Five justices joined in a majority opinion concluding, in effect, that if the states "as states" want protection within the constitutional system they must look to Congress, not to the courts. The "principal means," Justice Blackmun wrote, by which the role of the states in the federal system is to be ensured "lies in the structure of the Federal Government itself."³

The states and localities, to be sure, will survive the impact of *Garcia's* immediate holding, which involves the application of the Fair Labor Standards Act to a municipally owned mass-transit system. The holding undoubtedly will be both burdensome and expensive, but most local governments will find ways to adjust, as they have done to other fiscal and legal vicissitudes. But far more than labor laws and bus drivers' pay is at stake in *Garcia*.

Garcia raises fundamental questions about the role of the Supreme Court as the balance wheel of the federal system. The Court in *Garcia* abdicates a function that history, principle, and an understanding of the political process strongly argue that the federal judiciary should undertake. For those who care about the health of American constitutionalism—including, but not limited to, federalism—*Garcia* should be an unsettling decision.

¹ 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 61 (P. Bradley ed. 1945).

² 105 S. Ct. 1005 (1985).

³ *Id.* at 1018.

Although the ultimate reach of *Garcia* is unclear,⁴ the decision adopts a variation on a theme asking the Court to stay its hand when a litigant claims that a federal action is beyond the authority of the Federal Government in that the action encroaches upon some protected right of the states. Final resolution of such claims, this thesis runs, should be left to the political branches of the government.

Such a position reads an important part of the Founders' assumptions out of the constitutional order. One may debate—though the point has long since been academic—whether the Founders intended the Supreme Court to have the power of judicial review. But assuming the legitimacy of that doctrine, it is hard to escape the conclusion that the Founders assumed that limiting national power in order to protect the states would be as much a part of the judicial function as any other issue.

James Madison, in Federalist No. 39, was explicit: there must be a tribunal empowered to decide "controversies relating to the boundary between the two jurisdictions."⁵ The nature of the ratification contest—especially the Federalists' need to reply to anti-Federalist charges—supports the conclusion that the proponents of the Constitution saw the necessity that federalism be among the institutional arrangements protected in the constitutional system.

The principle of the rule of law adds force to what this history teaches. A basic tenet of Anglo-American constitutionalism is that no branch of government should be the ultimate judge of its own powers. The principle that one cannot be a judge in one's own cause is of centuries' standing. This principle is stated by Sir Edward Coke in *Dr. Bonham's Case* (1610)⁶ and, in our own time, has been reinforced by *United States v. Nixon* (1974).⁷ The principle is especially important in a system that, in addition to being federal, looks to checks and balances and the separation of powers to restrain arbitrary government.

⁴ As Justice Powell noted in dissent, the majority opinion purported to recognize "that the States retain some sovereign power." *Id.* at 1033 (Powell, J., dissenting). Yet, as Justice Powell also observed, the opinion left unclear when, if ever, this residual sovereignty would be protected from federal regulation premised on the Commerce Clause. *Id.*

⁵ THE FEDERALIST No. 39, at 256 (J. Madison) (J. Cooke ed. 1961).

⁶ *Dr. Bonham's Case*, 77 Eng. Rep. 638 (C.P. 1610).

⁷ 418 U.S. 683 (1974) (affirming the power of the Supreme Court to determine whether claimed powers of other branches of the government are constitutionally permissible).

A further flaw in *Garcia* is its resting upon erroneous suppositions about the ways in which the nation's political process actually works. Essential to any argument that the Court should abstain from adjudicating limits on national power vis-à-vis the states is the notion that the states have ample protection in the processes of politics.⁸

This assumption has two dimensions. One is institutional—that the states play a major role in structuring the national government. The other is political—that the ways in which the process actually works (such as in the political parties and in Congress) focus on the states. In fact, neither branch of the argument reflects current realities.

There was a time when the states had considerable influence over the shape of federal politics. Under the original Constitution, U.S. senators were elected by the legislatures of their respective states. The Constitution did not set federal standards for congressional elections; the states controlled the franchise. And it was up to the state legislatures as to how to draw the boundaries of congressional districts.

All this has changed. The seventeenth amendment (adopted in 1913) brought direct election of senators.⁹ Judicial decisions (such as that striking down the poll tax)¹⁰ and acts of Congress (notably the Voting Rights Act of 1965) have federalized much of the law respecting the franchise.¹¹ The 1965 statute, for example, requires preclearance (by the Attorney General or the District Court for the District of Columbia) of voting changes in areas covered by the Act.¹² State power to apportion congressional seats has been circumscribed by decisions such as the Supreme Court's 1964 opinion

⁸ Modern variations of this argument trace their roots to Herbert Wechsler's article, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The most vocal contemporary champion of Wechsler's position is Jesse Choper. See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 171-259 (1980).

⁹ The seventeenth amendment reads in part: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . ." U.S. CONST. amend. XVII.

¹⁰ See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

¹¹ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)). Numerous amendments since 1965 have both extended and expanded the coverage of the original Act.

¹² 42 U.S.C. § 1973c (1982).

in *Wesberry v. Sanders*, requiring that congressional districts be based on population.¹³

Accompanying these significant shifts in institutional arrangements has been a palpable decline in the "political" safeguards.¹⁴ Political parties, especially at the state level, no longer are the force they once were. Increased use of primaries and the impact of "reforms" have had the unintended consequence of encouraging the development of alternative institutions. Most striking has been the rise of Political Action Committees, which now number in the thousands.

The "nationalization" of campaign finance has led to the weakening of the federal lawmakers' loyalties to constituents. Special interest politics has tended to replace consensus politics. Moreover, the explosive growth of the Federal Government in modern times has brought the emergence of the "iron triangle"—the convergence of bureaucrats, interested legislators (often powerful committee chairmen), and lobbyists to determine the shape of federal programs.¹⁵

In defense of having the Court abdicate tenth amendment questions, as it did in *Garcia*, one sometimes hears the argument that the Court cannot resolve empirical questions. Thus, it is argued, assessing the facts of a given case to "balance" competing state and federal interests requires the Court to undertake a mode of enquiry that more properly belongs to legislators. Yet in other areas of constitutional litigation, the Court resolves empirical questions as a matter of course. Every case involving claims that a state act burdens commerce requires the resolution of economic and other such data, but the Court does not shirk this task. Another objection to the Court's having a role in tenth amendment cases is that the justices cannot draw workable distinctions, such as deciding (as precedents before *Garcia* had sought to do) what is and what is not a "traditional governmental function" (and hence entitled at least to some presumptive measure of protection against federal intrusion). Such line-drawing is, of course, difficult. But its

¹³ 376 U.S. 1 (1964).

¹⁴ See Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 862-64 (1979); Pomper, *The Decline of the Party in American Elections*, 92 POL. SCI. Q. 21, 41 (1977).

¹⁵ See generally H. SEIDMAN, *POLITICS, POSITION, AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION* 37 (1970).

being difficult does not mean that it should not be undertaken, any more than the conceptual difficulties of deciding what constitutes "speech" or "religion"—the thorniest of problems—are grounds for not deciding first amendment cases.

Whatever the tangles confronting the Court, there are even graver reasons to question Congress' competence or willingness to make considered judgments on constitutional questions—especially when the question is that of the limits of Congress' own power. The judicial process may have its flaws, but it aspires to a degree of rationality, including analytical reasoning, that one does not associate with the legislative process. The limits of time, the pressures of lobbyists, the temptations of expediency, undue reliance on staff, and other distractions often have more to do with the final shape of legislation than any thinking about constitutional issues. Martin Shapiro makes the point well: "The nature of the legislative process, combined with the nature of constitutional issues, makes it virtually impossible for Congress to make independent, unified, or responsible judgments on the constitutionality of its own statutes."¹⁶

Still another argument for the Court's leaving the states and localities to the tender mercies of Congress is that the Court needs to husband its scarce political capital. This argument raises the spectre of a return to "dual federalism"—the *ancien regime*, before 1937, when the Supreme Court often derailed federal social and economic legislation in the name of states' rights.

Such a risk is chimerical. For the Court to play a role in protecting the states as states under the tenth amendment, as the majority set out to do in the Court's 1976 decision in *National League of Cities v. Usery*¹⁷ (overruled in *Garcia*), raises no question about Congress' power over the *private sector*.

As to keeping the Court out of unnecessary controversies, most of the debate over "judicial activism" in recent decades has involved such issues as school prayer, criminal justice, and abortion. Federalism cases may provoke academic debate—and, of course, matter enormously to state and local officials—but they stir little outrage in the country at large. It is individual rights decisions

¹⁶ M. SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 30 (1966).

¹⁷ 426 U.S. 833 (1976) (Fair Labor Standards Act of 1974 is unconstitutional intrusion by the federal government into an area of traditional state powers).

that, by and large, stir passions. One doubts that the partisans of *Garcia* would be content to see individual rights matters, because they may be controversial, left likewise to the political process.

Garcia betrays a glaring disregard of a basic truth about American constitutionalism: That institutional rights, under our Constitution, are a form of individual rights. Even such basic guarantees as those in the Bill of Rights and the fourteenth amendment do not secure absolute personal rights. The protection created is against governmental (that is, institutional) actions, not against infringements by private parties. Thus, to secure individual rights requires assurances as to the stability of the institutional safeguards explicit or implicit in the Constitution.

The individual American—as the heir to those who brought the Constitution into being and agreed to its adoption—has a fundamental entitlement to living under the form of government spelled out in the Constitution. The separation of powers is not to be abandoned simply because it may be inconvenient. Likewise, one of the predicates of the constitutional order is that the Supreme Court adhere to the values of federalism as manifestly implicit in the Constitution. Federalism may be an elusive idea, but it is no mere abstraction. And, while it was essential to the adoption of the original Constitution, it is more than simply a political compromise adopted to get the Constitution underway. Federalism is linked with individual liberty and with the health of the body politic.

It is through participation in government at the local level that the citizen is educated in the value of civic participation. A robust federalism encourages state and local governments as schools for citizenship. Moreover, federalism both reflects and encourages pluralism, allowing individual idiosyncracies to flourish. One often hears Justice Brandeis quoted on the states' serving as "laboratories" for social and economic experiments.¹⁸ The states are more than mere laboratories; to the extent they encourage pluralism, the states are handmaidens of the open society.

Ultimately, the case for federalism rests on a concern for preserving the right of choice—the essence of political freedom. State and local governments have, of course, often trampled this very right, for example, when they have denied the vote because of one's race. The remedies for such abuses lie in vigorous judicial

¹⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

enforcement of constitutional guarantees and in Congress' power to protect civil rights. But the need to guard against trespasses by states or localities on individual liberties does not undermine the conclusion that federalism as such can operate as part of the very matrix of protection for individual liberties.

In refusing to enforce the tenth amendment—to play the role they regularly undertake in respect to other provisions of the Bill of Rights—the *Garcia* majority leaves an important constitutional sentry post unmanned. What recourse do those who care about the health of federalism have?

There are other opportunities for courts to vindicate the underlying values of federalism. Federal statutes may be interpreted in light of their impact on state and local governments. For example, the Court's 1981 *Pennhurst* decision lays down the salutary rule that federal grant conditions, to be binding on state and local governments, must be clearly identified as such when grant funds are accepted.¹⁹ Notions of comity can come into play when reviewing lower courts' use of their equity powers to reform state institutions (such as prisons)²⁰ or when deciding how far a federal court may go in intervening in state court proceedings (as in the Court's 1971 decision in *Younger v. Harris*).²¹

Ultimately, one may hope for the undermining or demise of *Garcia*. The majority decision stops short of saying that under no circumstances could the constitutional structure impose affirmative limits on federal actions affecting the states. A more favorable fact situation than that in *Garcia*, one entailing a more serious intrusion on the states and a more marginal federal interest, might furnish the occasion to begin the movement away from the unfortunate decision in *Garcia*.

Early and outright reversal of *Garcia* should not lightly be predicted, even assuming new justices are appointed to the Court. Reversals typically come only after a precedent has been robbed of vitality. The Court decided *Gideon v. Wainwright* (1963), requir-

¹⁹ *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981).

²⁰ As Justice Powell noted for the Court in *Procunier v. Martinez*: "[W]here state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." 416 U.S. 396, 405 (1974); see also *Rizzo v. Goode*, 423 U.S. 362 (1976), where, in part because of federalism principles, the Court questioned the propriety of federal equitable relief in a § 1983 action.

²¹ 401 U.S. 37 (1971).

ing states to appoint counsel for felony defendants unable to afford a lawyer, only after twenty years of experience under *Betts v. Brady* proved that an ad hoc approach would not do.²² Likewise, it was easier for Justice Blackmun to rationalize the result in *Garcia* by pointing to the Court's difficulties in post-*National League of Cities* decisions such as *EEOC v. Wyoming*²³ and *FERC v. Mississippi*.²⁴

Still, one can hope that eventually a majority of the justices will come to realize the mistake made in *Garcia*. Because federalism is an intrinsic component of the constitutional system—indeed, bolsters other constitutional values—safeguarding that process cannot be left to the unrestrained discretion of the political branches. It may be that the authority pronounced in *National League of Cities* (and renounced in *Garcia*) ought to be sparingly used. But it is salutary that the political branches know that the Court has power to step in when the facts point to intervention.

It is no less legitimate and proper for the Supreme Court to concern itself with assuring the health of federalism as it is for the Court to uphold individual liberties as such. In neither case is abdication of the Court's proper role consistent with the principles inhering in the Constitution.

²² Compare *Betts v. Brady*, 316 U.S. 455 (1942) with *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²³ 460 U.S. 226 (1983) (the Age Discrimination in Employment Act can be constitutionally applied to the states under *National League of Cities*.)

²⁴ 456 U.S. 742 (1982) (the functions of the Federal Energy Regulatory Commission do not violate state sovereignty due to their "substantial interstate effect").

